

April 24, 2006

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Joseph K. Huffman

Date of Filing: March 15, 2006

Case Numbers: TFA-0153

This Decision concerns an Appeal that Joseph K. Huffman filed from a determination that was issued to him by the Manager of the Pacific Northwest Site Office (PNSO) of the Department of Energy (DOE). That determination responded to a request for information that Mr. Huffman filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In that determination, PNSO denied Mr. Huffman's request. In his Appeal, Mr. Huffman seeks the release of the withheld information, or, in the alternative, that we remand this matter to PNSO for the issuance of another determination letter.

The FOIA generally requires that documents held by federal agencies be released to the public on request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information that agencies are not required to release. 5 U.S.C. § 552(b)(1) - (9); see also 10 C.F.R. § 1004.10(b)(1) - (9).

I. Background

In his FOIA request, Mr. Huffman sought access to "all data, code, and non-restricted documentation in machine readable format from the computer mouse biometric project known as 'Rainer.'" Determination Letter at 1. In its determination letter, PNSO stated that the "Federal agency sponsoring the project [the work product of which] you requested" considers that work product to be "Official Use Only," and that it is therefore subject to withholding under FOIA Exemption 2 (5 U.S.C. § 552(b)(2)). The letter goes on to state that the "project involves sensitive critical infrastructure information regarding systems and assets vital to the United States, and that public release of this information would have a debilitating impact on security, national economic security, and public safety." *Id.*

In his Appeal, Mr. Huffman contends that PNSO did not follow the proper procedure in processing his request. Specifically, he contends that if the requested information belongs entirely to another agency, PNSO should have referred his request to that agency for direct response to the requester, "rather than assert that agency's denial decision." Appeal at 2. Mr. Huffman therefore requests that we remand this matter to PNSO for referral to the unnamed federal agency and a direct response to

him. In the alternative, Mr. Huffman challenges the agency's withholding of the requested material under Exemption 2.

II. Analysis

When the DOE receives a FOIA request for information in its possession that is the property of another federal agency, the applicable regulations require that the request be referred to that agency. 10 C.F.R. § 1004.4(f)(1). That other agency should then process the request and respond directly to the requester. *See Rzeslawski v. United States Department of Justice*, No. 97-1156, slip op. at 6 (D.D.C. July 23, 1998); *Stone v. Defense Investigative Service*, No. 91-2013, 1992 WL 52560, at *1 (D.D.C. Feb. 24, 1992). *See also Research Information Services, Inc.*, Case No. VFA-0235 (November 27, 1997). Although it is evident that PNSO did consult with the unnamed agency, we agree with Mr. Huffman that the correct procedure in this case would have been for PNSO to formally refer this matter to the agency for direct response to the requester. We will therefore remand this matter to PNSO for referral to the unnamed agency, and for a direct response to Mr. Huffman by that agency.

Although we are remanding this matter for referral to another agency, we believe it appropriate to discuss the adequacy of PNSO's determination letter, as this is an issue that is likely to recur in future Appeals. Once the DOE decides to withhold information, both the FOIA and the Department's regulations require the agency to provide a reasonably specific justification for its withholding. 5 U.S.C. § 552(a)(6), 10 C.F.R. § 1004.7(b)(1); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673 (D.C. Cir. 1976) (*Kleppe*); *Digital City Communications, Inc.*, 26 DOE ¶ 80,149 at 80,657 (1997); *Data Technology Industries*, 4 DOE ¶ 80,118 (1979). This allows both the requester and this Office to determine whether the claimed exemption was accurately applied. *Tri-State Drilling, Inc.*, 26 DOE ¶ 80,202 at 80,816 (1997). It also aids the requester in formulating a meaningful appeal and this Office in reviewing that appeal. *Wisconsin Project on Nuclear Arms Control*, 22 DOE ¶ 80,109 at 80,517 (1992). Thus, an agency withholding material under Exemption 2 must explain how that exemption was applied.

Exemption 2 exempts from mandatory public disclosure records that are related solely to the internal personnel rules and practices of an agency. 5 U.S.C. 552(b)(2); 10 C.F.R. § 1004.10(b)(2). The courts have interpreted the exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature ("low two" information), and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). The information at issue in the present case involves only the second category, high two information. An agency seeking to withhold information under high two must be able to show that (1) the requested information is predominantly internal, and (2) its disclosure significantly risks circumvention of agency regulations or statutes. *Crooker v. ATF*, 591 F.2d 753, 771 (D.C. Cir. 1978) (*en banc*).

The justification for withholding the requested information under Exemption 2 provided to PNSO by the unnamed agency does not adequately address either of these requirements. When used by the

DOE, the term “Official Use Only” reflects an agency determination that the information in question is protected from mandatory FOIA disclosure under one or more of eight of the exemptions set forth at 5 U.S.C. § 552(b). * *See* DOE Order 471.3, Identifying and Protecting Official Use Only Information. However, this designation by itself is insufficient as a justification for withholding information under the FOIA because it does not explain how the exemption in question was applied, thereby making it impossible for the requester to formulate a meaningful appeal, and for this Office to evaluate that appeal. In this case, the justification provided by the unnamed agency does not indicate whether the requested material is “predominantly internal,” *i.e.*, whether or not it purports to regulate activities among members of the public or sets standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public. *Cox v. United States Department of Justice*, 576 F.2d 1302 (8th Cir. 1978). Furthermore, although the DOE has very important statutory and regulatory obligations to protect the national security and ensure public safety, the justification does not indicate how release of the requested information would circumvent those obligations. We are therefore left to speculate as to the manner in which the unnamed agency applied Exemption 2 in withholding the requested information.

For the reasons set forth above, we will remand this matter to PNSO. On remand, PNSO should refer Mr. Huffman’s request to the unnamed agency for direct response to the requester.

It Is Therefore Ordered That:

- (1) The Freedom of Information Act Appeal filed by Joseph K. Huffman, Case Number TFA-0153, is hereby granted as set forth in paragraph (2) below.
- (2) This matter is hereby remanded to the Pacific Northwest Site Office, which shall refer Mr. Huffman’s request to the agency that owns the requested information for direct response to Mr. Huffman.
- (3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 24, 2006

*/ Exemption 1 information can never be “Official Use Only” because such information is classified by executive order.